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IN THE

Supreme Court of the United States

October Term, 1967

No. 1260

MACK TRUCKS, INC.,

Petitioner,

v.

BENDIX-WESTINGHOUSE AUTOMOTIVE AIR BRAKE COMPANY,

Defendant,

v.

LATROBE DIE CASTING COMPANY,

Third-Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH B. BAGLEY,
BAGLEY & SYDOR,

Attorneys for Petitioner.

716 Frick Bldg.,
Pittsburgh, Pa. 15219.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
5022 CARLYN DRIVE, PITTSBURGH, PA., 15236
412-881-7483

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Mack Trucks, Inc., by its Attorney, Joseph B. Bagley, prays that a Writ of Certiorari issue to review the decision of the Third Circuit Court of Appeals.

Opinions Below

The opinion of the Federal District Court for the Western District of Pennsylvania was entered May 5, 1965, and is unreported. The opinion of the Court of Appeals for the Third Circuit was entered December 15, 1966, and is reported at 372 Fed. 2d 18 (1966).

Jurisdiction

The jurisdiction of the Court was invoked under 28 U. S. Code 1254 (1).

Question Presented

Whether the Federal District Court for the Western District of Pennsylvania and the Third Circuit Court of Appeals hearing this case solely upon the basis of diversity of citizenship applied as the law, principles which the proper state courts would not have applied, thus not following the "Erie" doctrine of *Erie R. R. Co. v. Tompkins*, 304 U. S. 64 (1938), and *Guaranty Trust Co. v. York*, 326 U. S. 99 (1945).

Statute Involved

The statutory provision involved is 12 Pa. Stat. Ann. § 39.

Statement

Petitioner is a registered New York corporation whose principal place of business in 1958, through October, 1965, was New Jersey and since October, 1965, has been Pennsylvania. From its Allentown, Pennsylvania Plant, Petitioner purchased a brake pedal assembly from Defendant, Bendix-Westinghouse Automotive Air Brake Company, an Ohio corporation, sometime prior to January 24, 1955. Petitioner installed the brake pedal assembly in Pennsylvania in one of its trucks. The brake pedal assembly was manufactured in Pennsylvania by Latrobe Die Casting Company, Third-Party Defendant. The entire brake pedal assembly was installed in Pennsylvania by the Petitioner in one of Petitioner's trucks. On May 22, 1958, while the truck was being operated in Miami, Flordia, the brake pedal assembly broke off causing an accident. An examination of the brake pedal assembly revealed a latent defect, not known to the Petitioner, caused by the manufacture of the said brake pedal assembly. Suit was filed against Peti-

tioner and a verdict was subsequently obtained against Mack Truck, Inc., and the owner of the truck on the basis that the defective brake pedal assembly was the proximate cause of the accident.

Due notice was given Bendix-Westinghouse Automotive Air Brake Company by a series of registered letters from the Petitioner which informed the Defendant at all stages of the proceedings that the suit and subsequent verdict against Mack Trucks, Inc., was the result of a defect in the brake pedal assembly purchased from the Defendant. Due to Florida's Rules of Procedure, the Petitioner was not permitted to join Bendix-Westinghouse as an Additional Defendant in the suit resulting from the accident. However, said company was at all times fully informed of the Petitioner's intention to hold it liable for all costs and judgments arising from the defect in the brake pedal assembly, and of Petitioner's desire to have Bendix-Westinghouse enter and defend said suit.

As its share of the verdict in the Florida accident case, Petitioner was forced to pay $13,028.95. The formal "Satisfaction of Judgment" duly executed by counsel was filed and entered in the records of the Florida Court on June 30, 1960.

On October 10, 1963, Petitioner brought suit against Bendix-Westinghouse on the common law theory of indemnity in the Federal District Court for the Western District of Pennsylvania. The jurisdiction of the Court was based upon Diversity of Citizenship, 28 U. S. Code § 1332. Bendix-Westinghouse joined Latrobe Die Casting Company, the manufacturer, as a Third-Party Defendant charging that the Third-Party Defendant manufactured the brake pedal assembly in question and would be liable over to Bendix-Westinghouse for any monies due Petitioner.

The Defendants moved for Summary Judgment on the basis that the claim of Mack Trucks, Inc., was barred by the statute of limitations. The case was argued before the United States District Judge, John L. Miller, and on May 5, 1965, a judgment was entered in favor of Defendant and Third-Party Defendant. The judgment was based upon the applicable statute of limitations.

The Petitioner then appealed to the United States Court of Appeals for the Third Circuit. On December 15, 1966, the decision below was affirmed with Freedman, J., dissenting. The Court of Appeals decision was based on the following Pennsylvania statute, commonly known as the Pennsylvania "borrowing" statute:

> "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any courts of this Commonwealth." 12 Pa. Stat. Ann. § 39.

The Court of Appeals interpreted this statute as calling for the application of a statute of limitations of the *State of Florida.*

Petitioner's Petition for Re-Hearing in the Court of Appeals was denied on January 18, 1967.

Reasons for Granting the Writ

I

The decision of the Third Circuit Court of Appeals is not in line with the Pennsylvania law, as stated in recent Pennsylvania Supreme Court decisions.

The Third Circuit Court of Appeals, in interpreting the Pennsylvania "borrowing" statute (12 Pa. Stat. Ann. § 39), held that the cause of action arose when the judgment was

entered and later satisfied by the Petitioner in Florida. It then held that under the "borrowing" statute, the three-year Florida statute of limitations is applicable.

In *Griffith v. United Airlines, Inc.* (416 Pa. 1 1964), the Pennsylvania Supreme Court in adopting the "Significant Contacts" rule, abandoned the *lex loci delecti* rule "in favor of a more flexible rule which permits analysis of the policies and interests underlined in particular issue before the Court." (416 Pa. at 21). This flexible rule is more preferable, it is believed, than the "wooden application of a few overly simple rules, based on the outmoded 'vested rights' theory. * * *" (416 Pa. at 13). Subsequent to the *Griffith* case, in *McSwain v. McSwain*, 420 Pa. 86 (1966), the Pennsylvania Supreme Court stated:

> "Whether the policies of one state rather than another should be furthered in the event of conflict can only be determined within the matrix of specific litigation. What should be sought is an analysis of the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interests in the application of its rule of law." (420 Pa. at 94).

Both *Griffith* and *McSwain* amply show Pennsylvania's view on problems in the area of conflict of laws. The primary inquiry should always be into just which state has the superior interests, in the form of contacts. Pennsylvania has even gone so far as to apply this view to a case which had been tried prior to the *Griffith* case, but whose appeal came after *Griffith* had been handed down. This was done in *Kuchinic v. McCrory*, 422 Pa. 620 (1966). On the basis of such cases as the above mentioned, it seems obvious that Pennsylvania now refuses to apply the law of jurisdictions which have no interest in the outcome of the litigation.

In the case at hand, both the Federal District Court and the Third Circuit Court of Appeals, on the basis of the

Pennsylvania "borrowing" statute, have applied the statute of limitations of the State of Florida. Petitioner contends that the Pennsylvania Courts would not have reached the same conclusion. While Florida had an interest in the tort case, because of the injured party's residence there, and also because of the accident occurring there, in the indemnity suit, Florida could not possibly have a legitimate interest. None of the present litigants are Florida residents. The brake pedal assembly was not manufactured or installed there. The purchase of the brake pedal assembly did not occur there. Yet, all of these factors being present, the Courts below still determined that Pennsylvania law calls for them to apply the Florida statute of limitations, regardless of the Pennsylvania "contacts."

In the present case, the cause of action is said to have arisen in Florida because it is there that Petitioner satisfied the judgment and thus started the time to run which marked when the cause of action arose. Such an interpretation of the "borrowing" statute relegates the Pennsylvania law to a "place of payment" rule. Under future application of such a rule, the court would only be looking to where the payment was made, and then apply the law of that place. Such a rule is directly contrary to the stated law and policy of the *Griffith, McSwain* and *Kuchinic* cases, in their abhorrence of "wooden applications" of mechanic rules. In the dissenting opinion below, Freedman, J., stated:

> "I, therefore, believe that the Pennsylvania Courts would interpret the borrowing statute by the application of general choice of law principals rather than promulgate a general rule whose effect in many cases would be to rest one party with the power to chose the controlling statute of limitations by manipulations of the place payment" (372 Fed. 2d at 23).

The Petitioner believes this to be the true approach which would be taken by a Pennsylvania Court. Petitioner's right to indemnity arose out of a business transaction whose essential contacts all were in Pennsylvania. The manufacture, purchase, delivery and installation of the brake pedal assembly took place in Pennsylvania where Petitioner is engaged in business. Thus, Pennsylvania has the substantial interest in determining for itself which when such a party's cause of action should be barred.

The "borrowing" statute must be interpreted by the Pennsylvania Court, as is the case with all statute law. Such judicial interpretation should necessarily coincide with the current judicial views and policies. Therefore, the Pennsylvania Court would, in interpreting the statutory terms "cause of action" and when and where it "arose", apply the current choice of law policies. In so doing, it would hold that the cause of action arose in Pennsylvania where the contractual relationship out of which the suit arose originated. Such an interpretation is obviously more reasonable than interpreting the statutory terms in such a manner as to make applicable the law of a completely disinterested jurisdiction.

Conclusion

To protect the integrity of the "Erie" doctrine, and to prevent the formation of a Federal common law in Diversity of Citizenship cases, and to bring the Federal Courts into line with the current Pennsylvania policies and laws in this area, the Writ of Certiorari should be granted.

II

Assuming that the Pennsylvania Supreme Court would agree with the Courts below in their determination that the

Pennsylvania "borrowing" statute calls for the application of Florida law, Petitioner contends that the Courts below applied the wrong Florida statute of limitations.

No Florida case law was discussed in the briefs of either party below, which actually applied § 95.11 (5) (e) of the Florida statutes to a lawsuit based upon the common law action of idemnity. This subsection provides that a three-year statute of limitations is applicable to actions upon contracts, obligations or liabilities not founded upon an instrument in writing. Yet, the Courts below held this section applicable.

Petitioner insists that the common law action for indemnity in this case arose out of the within contract of sale and thus comes within the purview of 95.11 (3) calling for a five year statute of limitations for action upon a contract, obligation or liability founded upon a written instrument. Or, in the alternative, Petitioner contends that 95.11 (4) is applicable. The latter section applies a four year statute of limitations to actions not specifically covered by the other section of the statute.

Conclusion

If the Courts below are permitted to apply as the appropriate statute of limitations a section which the Florida courts would not apply, then there exists as law principles which are not the law of Florida. If such a condition is tolerated, then the "Erie" doctrine is destroyed.

Respectfully submitted,

JOSEPH B. BAGLEY,
BAGLEY & SYDAR,
Attorneys for Petitioner.

Appendix "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15539

MACK TRUCKS, INC.,

Appellant,

v.

BENDIX-WESTINGHOUSE AUTOMOTIVE AIR BRAKE COMPANY,

v.

LATROBE DIE CASTING COMPANY,

Third-Party Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 14, 1966

Before: MCLAUGHLIN, HASTIE and FREEDMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 15, 1966.)

By HASTIE, *Circuit Judge.*

This is an action for indemnity. It is of federal cognizance solely under diversity jurisdiction. The District

Court for the Western District of Pennsylvania dismissed the action as barred by the statute of limitations. This appeal followed.

The claim for indemnity arose in this way. Bendix-Westinghouse Automotive Air Brake Co. sold brake pedal assemblies, manufactured for it by Latrobe Die Casting Co., to Mack Trucks, Inc., for incorporation in vehicles manufactured by Mack. A truck, incorporating such a brake assembly, was sold to a resident of Florida. While the vehicle was being operated in Florida, the brake assembly broke, causing an accident. A person injured in the accident sued Mack and the operator of the truck in a Florida court and recovered a judgment for $13,028.95, which Mack paid. A formal "Satisfaction of Judgment", duly executed by counsel, was filed and entered in the records of the Florida court on June 30, 1960.

Mack gave Bendix timely notice of the Florida suit, although Florida procedural rules prevented the joining of Bendix as an additional defendant. However, it was not until October 10, 1963, more than three years after the satisfaction of the Florida judgment, that Mack brought this suit for indemnity against Bendix in the Western District of Pennsylvania. Bendix joined Latrobe as a third-party defendant.

One defense was the statute of limitations. Since this was a diversity case, the district court, no different from a Pennsylvania state court, was obligated to apply Pennsylvania choice of law rules to determine what statute of limitations was applicable. *Guaranty Trust Co. v. York*, 1945, 326 U. S. 99. In most situations, Pennsylvania courts apply the statute of limitations of the forum. *Freeman v. Lawton*, 1946, 353 Pa. 613, 46 A. 2d 205; *Rosenzweig v. Heller*, 1931, 302 Pa. 279, 153 Atl. 346. However, there is a

statutory exception to this rule. Pennsylvania courts must respect and apply the following Pennsylvania "borrowing" statute:

> "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commonwealth." 12 P. S. § 39.

Thus, if this "cause of action * * * arose" in Florida, reference must be made to the appropriate Florida statute of limitations. *Mangene v. Diamond*, 3d Cir. 1956, 229 F. 2d 554. The district court concluded that the cause of action arose in Flordia. We agree.

The concept of "the arising of a cause of action" is used frequently to systematize and facilitate the application of statutes of limitations. Usually, the problem is to determine when the statute begins to run. In this context, the familiar rule is that the statute begins to run when the cause of action arises, as determined by the occurrence of the final significant event necessary to make the claim suable. *Foley v. Pittsburgh-Des Moines Co.*, 1949, 363 Pa. 1, 68 A. 2d 517; *Bell v. Brady*, 1943, 346 Pa. 666, 31 A. 2d 547; *Shaffer's Estate*, 1910, 228 Pa. 36, 76 Atl. 716. With reference to claims for indemnification for loss, this means that the cause arises when the plaintiff sustains the loss for which he can claim indemnification. *Chicago, R. I. and Pacific Ry. v. United States*, 7th Cir. 1955, 220 F. 2d 939; *Northwestern Airlines, Inc. v. Glenn L. Martin Co.*, D. Md. 1958, 161 F. Supp. 452; *Hidick v. Orion Shipping & Trading Co.*, S. D. N. Y. 1957, 157 F. Supp. 477; *Globe Indemnity Co. v. Larkin*, 1944, 62 Cal. App. 2d 891, 145 P. 2d 633. In the present case, the cause of action for indemnity arose when Mack satisfied the judgment, an event evidenced by formal entry of record in the Florida court on June 30, 1960.

The Pennsylvania borrowing statute utilizes this concept of the arising of a cause of action in relation to place rather than time in order to specify the circumstances in which a Pennsylvania court shall apply another state's statute of limitations and to identify the appropriate state. We think the concept of when a cause arises and the concept of where a cause arises, both used to aid in the application of statutes of limitations, are *in pari materia*. In other words, the cause arises where as well as when the final significant event that is essential to a suable claim occurs. *Bank of Nova Scotia v. San Miguel*, 1st Cir. 1952, 196 F. 2d 950; *Orschel v. Rothschild*, 1925, 238 Ill. App. 353; *Runkle v. Pullin*, 1912, 49 Ind. App. 619, 97 N. E. 956. In this case the cause of action arose when a judgment was entered against and later satisfied by Mack in Florida. By the same token, Florida is the state where the cause of action for indemnity arose.

In an effort to avoid this conclusion, the appellant cites *Griffith v. United Air Lines*, 1964, 416 Pa. 1, 203 A. 2d 796. There it was held that the measure of damages in a tort case should be determined in accordance with the law of the place having the most significant contacts with the relevant transactions and with the parties rather than by the law of the place of the wrong. In so holding, the court announced a common law conflict of laws rule for the choice of law to be applied in deciding the merits of certain issues. No statute was controlling, and there was no question of when or where the cause of action arose, though apparently it arose at the place of wrong.

Here we have a very different situation. Under the Pennsylvania borrowing statute a court is required to apply the statute of limitations of the state where the cause of action arose without regard to any contacts of any other

state with the parties and their prior dealings. And certainly neither the *Griffith* case nor any other of which we know suggests that the residence of the parties or the place of their earlier dealings before the claim became suable have any relevance to determining when or where the cause arose. Indeed, in *Foley v. Pittsburgh-Des Moines Co., supra,* Chief Justice Stern explicity stated that the accrual of a cause of action occurs when suable harm is done the plaintiff, "not when the causes are set in motion which ultimately produce injury as a consequence". 363 Pa. at 38, 68 A. 2d at 535.

Perhaps it would be arguable, on the merits of the present controversy, that in determining the existence or extent of an obligation to indemnify, the forum should be guided, as was the court in the *Griffith* case, by the substantive law of Pennsylvania because of cumulatively significant Pennsylvania "contacts". But we do not have that problem here. We have to answer only the narrow question of the meaning of the phrase "where the cause of action arose", as used in the Pennsylvania borrowing statute and applied to a situation in which the cause of action came into existence upon the happening of certain events in Florida.

It remains to determine what period of limitations Florida law specifies for such an action as this. Section 95.11(5)(e) of Florida Statutes Annotated stipulates that "an action upon a contract, obligation or liability not founded upon an instrument in writing" must be brought within three years after the action shall have accrued. While the relationship between Mack and Bendix-Westinghouse in this case resulted from a transaction of sale evidenced by a writing, no express promise to indemnify appears or is claimed. Rather, the plaintiff is suing on an imposed obligation which the seller must bear, even in the

absence of such a promise. Thus, this is "an action upon a * * * liability not founded upon an instrument in writing. * * *" *Cf. Webb v. Powell*, 5th Cir. 1937, 87 F. 2d 983; *Edgerly v. Schuyler*, Fla. 1959, 113 So. 2d 737; *Ball v. Roney*, 1933, 112 Fla. 186, 150 So. 240. As one Florida court has expressed the controlling concept, an action or a liability is "founded upon a written instrument" for purposes of statute of limitations only if that instrument contains an undertaking "to do the thing for the non-performance of which the action is brought". *Gulf Life Ins. Co. v. Hillsborough County*, 1937, 129 Fla. 98, 104; 176 So. 72, 75.

We conclude, as did the trial court, that the three year Florida statute of limitations is applicable to the claim in suit. There is no contention or evidence that the statute was tolled for any period. Accordingly, since this cause accrued not later than June 30, 1960, the date upon which Mack's satisfaction of the Florida judgment was entered in the records of the Florida court, the present action was barred at the time of its filing on October 10, 1963.

The judgment will be affirmed.

FREEDMAN, *Circuit Judge*, dissenting.

The determination under the Pennsylvania Borrowing Statute (Act of June 26, 1895, P. L. 375, § 1[1]) of where the present "cause of action" for indemnity "arose" involves two difficulties. There is first the generally elusive concept of a "cause of action". To this is added the nature of the present action for indemnity, originating in an implied

[1] 12 Purdon's Pa. Stat. Annot. § 39.

warranty and founded on a quasi contractual right of restitution which matured after a recovery in tort.[2]

The majority has wisely rejected a decision based on the predominance of the tort or contract elements which would lead to Florida as the *lex loci delictus* if the tort element prevailed and to Pennsylvania as the *lex loci contractus* if the contract element governed. I disagree, however, with the majority's conclusion that the place where the cause of action arose should be fixed where the event occurs which starts the running of the time for the statute of limitations.[3] This, it seems to me, has the attraction of simplicity but is just as inappropriate a test as are the labels of contract or tort in executing the policy of the Pennsylvania Borrowing Statute. It is not required by any Pennsylvania precedents old or new and is inconsistent with the modern trend of Pennsylvania law.

It is true that Mack's right to indemnity was against loss and not against liability and therefore arose only on Mack's payment to the injured party in satisfaction of the judgment. The use of this event as the time when the cause of action for indemnity arises is appropriate as the point of origin of the indemnitee's claim against the indemnitor. Even this rule, however, is often expressed without distinction between the time of payment and the

[2] See Builders Supply Co. v. McCabe, 366 Pa. 322 (1951). See also Crawford v. Pope & Talbot, Inc., 206 F. 2d 784, 792-93 (3 Cir. 1953).

[3] My view makes it unnecessary to reach the question whether if the cause of action is held to have arisen in Florida, the Pennsylvania Borrowing Statute must be held to look not merely to the period of limitations of Florida, but also to Florida's tolling provision. The Pennsylvania Borrowing Statute provides that the bar is a defense in Pennsylvania "when a cause of action has been fully barred by the laws of the state * * * in which it arose." See Mangene v. Diamond, 132 F. Supp. 27 (E. D. Pa. 1955), aff'd 229 F. 2d 554 (3 Cir. 1956); Hornsey v. Jacono, 12 D&C 2d 291 (C. P. Del. Co. Pa. 1957). The Florida statute (Fla. Stat. Annot., § 95.07) provides in relevant part: "If, when the cause of action shall accrue against a person, he is out of the state, the action may be commenced within the term herein related after his return to the state. * * *"

time of satisfaction of the judgment.[4] But at least for ordinary purposes, where the short interval between the payment and satisfaction of the judgment has no significance for the period of limitations involved, the rule is simple, easily applicable, and meets no countervailing elements.

A holding, however, that the place where a cause of action arose is to be conclusively equated with the location of the vagrant event which sets the time running, leads to serious problems. The place of the apparently simple element of payment is subject to fortuitous variations and may even be contrived. A corporation with a nationwide business may make or receive payment in any one of the states. If the place of payment is to be decisive, such a party can determine what statute of limitations shall bind it by a conscious choice of the office from which payment will be made, or conversely of the office to which payment ultimately will be made. When the payment is made in satisfaction of a judgment it may seem that the place of judgment should be the determinative factor. But there are many cases where indemnity arises on a payment which is made in settlement of a claim without the entry of a judgment. Even after a judgment, the possibility of appeal or the difficulty in obtaining satisfaction by execution may lead to a negotiated settlement effected in a place outside the state where the judgment was entered. It would be contrary to the law's deep-seated preference for settlement rather than litigation to make it an advantage for a party to have his liability determined by a judgment rather than by a settlement.

In the present case the cause of action is said to have arisen in Florida because it is there that Mack satisfied the

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[4] *E.g.*, Northwest Airlines, Inc. v. The Glenn L. Martin Co., 161 F. Supp. 452, 458 (D. Md. 1958).

judgment and thus started the time to run which marked when the cause of action arose. But suppose the judgment had not been satisfied, but a simple payment or even a settlement under the judgment had been made in Pennsylvania? Or suppose that a judgment had later been entered in Pennsylvania in a suit on the Florida judgment and the Pennsylvania judgment alone had been marked satisfied of record after a payment made in Pennsylvania? Would any of these circumstances alter the determination of where the cause of action arose?

It seems to me that the place where payment is made in settlement of a claim or in satisfaction of a recorded judgment does not contain the same undeviating element as does the time of payment, which is the inherent point of origin of the cause of action for indemnity. I therefore believe that the Pennsylvania courts would interpret the Borrowing Statute by the application of general choice of law principles rather than promulgate a general rule whose effect in many cases would be to vest one party with the power to choose the controlling statute of limitations by manipulation of the place of payment.

Pennsylvania is in the forefront of jurisdictions which have recently adopted a pragmatic standard of choice of law which eschews mechanical formulas. This standard reduces the possibility of manipulation to insignificance. It stresses the interests of the jurisdictions involved and emphasizes a principle of realism in preference to an automatic test applied by a rule of thumb. The Supreme Court of Pennsylvania adopted this modern standard in *Griffith v. United Air Lines, Inc.*, 416 Pa. 1 (1964). There the court refused to apply the Colorado limitation on damages against the estate of a Pennsylvania decedent even though he was killed in Colorado in the crash of an airplane. The

court applied the law of Pennsylvania because the decedent and the transaction itself, in which decedent had purchased his ticket from defendant in Philadelphia for a flight from that city to Arizona, had such contacts with Pennsylvania that Pennsylvania's interest in the outcome was more significant than that of Colorado. This interest principle, which has moved rapidly into the foreground of acceptance in American states,[5] has been applied by the Supreme Court of Pennsylvania in an increasing number of recent cases and is now firmly established in Pennsylvania decisional law.[6] A similar statutory rule for contract actions now prevails in Pennsylvania under the Uniform Commercial Code.[7] I think Pennsylvania would take a similar approach in construing the Borrowing Statute.

Pennsylvania's interest in the period of limitations to be applied in this action far outweighs the interest of Florida.[8] Florida's real interest was in the negligence action for the accident which occurred in Florida. That action, in which Florida's interest dominated, terminated in a judgment, which was satisfied by payment. The present action for indemnity, on the other hand, is dominated by Pennsylvania's interest. Mack's right of indemnity is based upon a business transaction whose essential contacts all were in Pennsylvania. The brake pedal assembly was manufactured, purchased, delivered and installed in the

[5] *E.g.*, Babcock v. Jackson, 12 N. Y. 2d 473, 191 N. E. 2d 279 (1963); Auten v. Auten, 308 N. Y. 155, 124 N. E. 2d 99 (1954); see Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P. 2d 906 (1961); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N. W. 2d 365 (1957). Many leading articles are cited in Griffith v. United Air Lines, Inc., 416 Pa. 1 (1964).

[6] See McSwain v. McSwain, 420 Pa. 86 (1966); Elston v. Industrial Lift Truck Co., 420 Pa. 97 (1966); Hunter Adoption Case, 421 Pa. 287 (1966); Kuchinic v. McCrory, 422 Pa. 620 (1966).

[7] Act of April 6, 1953, P. L. 3, § 1-105, as amended, 12A Purdon's Pa. Stat. Annot. § 1-105.

[8] There may, of course, be cases where two or more states have significant interests in having their period of limitations applied. *Cf.* George v. Douglas Aircraft Co., Inc., 332 F. 2d 73, 79 n. 6 (2 Cir. 1964).

truck in Pennsylvania where Mack was engaged in business. Pennsylvania therefore has a substantial interest in determining for itself when such a party's cause of action for indemnity should be barred. Otherwise the question would be left to the accident of the particular location where the events which effectuate the right to indemnity may have chanced to occur, and which the original parties would have had no means of foreseeing when they transacted their business. The rapid movement of motor vehicles across state lines should not result in a wayward choice of the place where a cause of action for indemnity arises, even though it is appropriate and just that a party injured by the negligence of the driver should be able to obtain redress for his injuries at the place where the accident occurred, if necessary by the use of a longarm statute.

Nor do I see any reason to restrict the modern Pennsylvania conflicts rule to so-called substantive law questions such as the existence or extent of the obligation to indemnify as distinguished from the present problem of the statute of limitations. Indeed, while limitations of action may fall under the heading of procedure, to the litigant a determination that his suit is completely barred by the statute of limitations is substantively far more drastic and important than a ruling on the extent of his right to indemnity. But I believe there is a deeper problem involved. Statutes of limitation seem simple on their face because the time period they fix can be measured by the clock. Experience has shown, however, that even here unexpected problems arise which present significant alternatives that can only be determined by a choice of policy. In some cases this policy has been settled by statute and where the courts have followed the letter of the statute they have made an unspoken choice not to alleviate its hardship. In Pennsylvania an

early Colonial statute[9] provided for the tolling of the period of limitations in favor of persons under the disabilities of minority, coverture, mental incompetency, imprisonment, or absence beyond the sea. Much of this statute was later held to have been impliedly repealed by a subsequent statute.[10] Among the statutory tolling provisions still in effect is one which exists where a defendant makes service of process impossible by becoming a nonresident after the cause of action arose.[11]

In those cases where the legislature has not provided relief the courts have had the choice of watching the clock or inquiring into the purpose of the statute. In recognizing the underlying purpose of the statute courts have early held that it would not be applied to bar a suit if the plaintiff was diverted from bringing it by the affirmative fraud of his adversary.[12] In *Ayres v. Morgan*, 397 Pa. 282 (1959), the Supreme Court of Pennsylvania held that the statute of limitations was suspended in malpractice cases where the injury was unknown and undiscoverable by the plaintiff. In doing so it departed from the traditional rule, which the New York Court of Appeals followed a few years later,[13] that the principle of repose requires the barring of suit in such cases in the absence of specific legislative relief. Similar problems arise where the cause of action results from the accumulation of injuries over a long period of time, as

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[9] Act of March 27, 1713, 1 Smith's Laws 76, § 5, 12 Purdon's Pa. Stat. Annot. § 35.

[10] Act of June 24, 1895, P. L. 236, § 2, 12 Purdon's Pa. Stat. Annot. § 34. Walker v. Mummert, 394 Pa. 146 (1958); Peterson v. Delaware River Ferry Co., 190 Pa. 364 (1899). See also Conrad v. Stitzel, 225 F. Supp. 244, 247 (E. D. Pa. 1963).

[11] Act of May 22, 1895, P. L. 112, § 1, 12 Purdon's Pa. Stat. Annot. § 40; Hunter v. Bremer, 256 Pa. 257 (1917).

[12] Smith v. Blachley, 198 Pa. 173 (1901). *Cf.* Bailey v. Glover, 88 U. S. (21 Wall.) 342 (1874).

[13] Schwartz v. Heyden Newport Chemical Corp., 12 N. Y. 2d 212, 188 N. E. 2d 142 (1963).

in silicosis,[14] and where negligent industrial operations result in the poisoning of the atmosphere and cause injuries which take long to mature as recognizable illness.[15] These statutes and decisions are a far cry from the view that the statute of limitations is capable of application as a simple chronological measure.

Borrowing statutes, like the statutes of limitations themselves, reflect an underlying policy. They have existed in various forms in many states,[16] and usually were intended to prevent a nonresident defendant from being subjected to an indefinite liability because the forum's period of limitations was suspended by tolling statutes during the defendant's absence from the jurisdiction.[17] Since in Pennsylvania the tolling provisions were inapplicable to defendants who were nonresidents at the time the cause of action arose and who had not entered the jurisdiction within the statutory period,[18] the Pennsylvania borrowing legislation must have had the broader purpose of assuring that the decision as to when the claim should be barred would be governed by the policy of the jurisdiction with the most significant interest in the claim,—the jurisdiction in which the "cause of action" "arose".[19] The Pennsylvania Borrowing Statute therefore early gave recognition to what is now the modern principle of the importance of the interest of the

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[14] Plazak v. Allegheny Steel Co., 324 Pa. 422 (1936). See also Urie v. Thompson, 337 U. S. 163 (1949).

[15] Daniels v. The Beryllium Corp., 227 F. Supp. 591 (E. D. Pa. 1964), and 211 F. Supp. 452 (E. D. Pa. 1962).

[16] Ester, Borrowing Statutes of Limitation and Conflict of Laws, 15 U. Fla. L. R. 33, 79-84 (1962), collecting and classifying the statutes of the various states and territories, and listing 38 states as having borrowing statutes of general application.

[17] George v. Douglas Aircraft Co., Inc., 332 F. 2d 73, 77 (2 Cir. 1964); Developments in the Law—Statutes of Limitations, 63 Harv. L. R. 1177, 1262-63 (1950); Ester, *supra*, at p. 42.

[18] Act of May 22, 1895, P. L. 112, § 1, 12 Purdon's Pa. Stat. Annot. § 40.

[19] See George v. Douglas Aircraft Co., Inc., 332 F. 2d 73, 77 (2 Cir. 1964) discussing an analogous New York statute of 1902.

respective jurisdictions in the underlying transaction. This principle is recognized, at least impliedly, in two of the cases cited by the majority. In *Orschel v. Rothschild,* 238 Ill. App. 353 (1925), not only had the plaintiff made the payment giving rise to the right of indemnity in Illinois whose statute of limitations the court applied, but the court also pointed out that the Illinois Borrowing Statute was inapplicable because the plaintiff was a resident of the forum. This in turn resulted from the restricted nature of the tolling statute which was inapplicable if neither party was a resident of the state when the cause of action accrued. In *Runkle v. Pullin,* 49 Ind. App. 619, 97 N. E. 956 (1912), while the court adopted the view that the time when a cause of action arises determines also the place where it arises, both parties to the transaction had resided in Indiana, but the defendant had become a nonresident when plaintiff paid the balance due on the note and remained a nonresident although he was within the jurisdiction at the time he was served. In the circumstances, therefore, Indiana had every possible contact with the transaction and almost every possible contact with the parties.

The Pennsylvania Borrowing Statute in speaking of a "cause of action" and where it "arose" has not undertaken to define these terms, but has left them to be given content by judicial refinement and clarification. This includes judicial developments in the future as well as those which have taken place in the past. While we may not alter the legislative command that the statutory period fixed by the forum state shall prevail in the designated cases, nevertheless, what is a "cause of action" and when and where it "arose" are matters for judicial interpretation and should reflect current views of the relative significance of state interest as a determinant of decision.

I would hold, therefore, that the present cause of action for indemnity arose in Pennsylvania where there originated the contractual relationship between the parties out of which the right of indemnity arose, rather than in Florida where the accident occurred and satisfaction of the judgment was made which ripened the claim for indemnity and started the time of the running of the statute of limitations. Since it is agreed that the action was within the time fixed as the period of limitations in Pennsylvania[20] I dissent from the conclusion that the action was barred.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[20] The action was brought within the four-year period prescribed by the Uniform Commercial Code (Act of April 6, 1953, P. L. 3, § 2-725, as amended, 12A Purdon's Pa. Stat. Annot. § 2-725) and, of course, within the six-year period prescribed for contract actions generally. Act of April 25, 1850, P. L. 567, § 7, 12 Purdon's Pa. Stat. Annot. § 31.

Appendix "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,539

MACK TRUCKS, INC.,

Appellant,

vs.

BENDIX-WESTINGHOUSE AUTOMOTIVE AIR BRAKE COMPANY,

vs.

LATROBE DIE CASTING COMPANY,

Third-Party Defendant.

(D. C. Civil Action No. 63-874.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Present: McLaughlin, Hastie and Freedman,

Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court, filed May 5, 1965, be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF,
Clerk.

December 15, 1966.

Appendix "C"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,539

MACK TRUCKS, INC.,
Appellant,

v.

BENDIX-WESTINGHOUSE AUTOMOTIVE AIR BRAKE COMPANY,

v.

LATROBE DIE CASTING COMPANY,
Third-Party Defendant.

SUR PETITION FOR REHEARING.

Present: Staley, *Chief Judge;* and McLaughlin, Kalodner, Hastie, Smith, Freedman and Seitz,
Circuit Judges.

The petition for rehearing filed by Mack Trucks, Inc., Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

BY THE COURT,

/s/ WILLIAM H. HASTIE,
Circuit Judge.

Dated: January 18, 1967.